A Report on the Feasibility of Establishing a Self-Funding Inspection, Maintenance, and Enforcement Program for Existing and Future Onsite Wastewater Treatment Systems in Blaine County, Idaho

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1. Summary

The Blaine County Board of Commissioners ("Board") has requested this feasibility report ("Report") of the legal and regulatory issues relating to establishing a self-funding inspection, maintenance, and enforcement program for existing and future onsite wastewater treatment systems in Blaine County, Idaho ("Program").

This Report summarizes the problems related to onsite wastewater treatment systems, examines the regulatory framework, reviews the legal authority for action by the County, compares suggested options under such authority, and discusses suggested components of such a program.

The conclusions of this Report are that (i) existing State of Idaho rules, which could require such inspections, are not being fully utilized, (ii) state rules allow for more stringent local rules, (iii) the County has broad powers to address such health and welfare issues by regulation and permits, (iv) the County can also exercise the powers of an "onsite sewer district" to address such issues, and (v) the County could implement the Program as either a permit requirement or an "onsite sewer district" pursuant to either a revised Chapter 5 or a new Chapter 7 of Title 7 (Health and Safety) of Blaine County Codes.

2. Terminology

The United States Environmental Protection Agency ("EPA") and the Division of Environmental Quality of the Idaho Department of Health and Welfare ("DEQ") use different names but similar definitions for relevant terms relating to this topic. An understanding of both sets of terms is important. This report shall use the DEQ terms and definitions set forth in Exhibit A unless the context otherwise indicates.[1]

Idaho categorizes wastewater (i.e., sewage) treatment systems into either public systems or onsite systems. Onsite systems are further divided into central systems (receiving more than 2,500 gallons per day of wastewater or receiving wastewater from more than two dwelling units or buildings under different ownership) and individual

[1] Idaho Administrative Procedure Act (IDAPA) 16, Title 1, Chapter 3, .003 Definitions (003.01-003.38).

systems (all other systems). Most individual systems have a subsurface point of discharge (e.g., "septic" systems). Individual systems are also further categorized as standard systems (i.e., gravity flow with normal subsurface discharge) or alternative systems (e.g., "engineered" systems with mounds, pumps, etc.).

The EPA categorizes wastewater (i.e., sewage) treatment systems into either centralized wastewater systems (i.e., publicly owned treatment works {POTW}[2]) or decentralized (i.e., onsite or clustered and serving a small service area). The EPA further divides onsite systems into large capacity systems (having the capacity to serve 20 or more persons per day) and "onsite wastewater treatment systems" (OWTS) (systems that "collect, treat, and disperse or reclaim wastewater from a single dwelling or building"). Finally, the EPA also further divides decentralized systems into "conventional onsite treatment systems" (i.e., septic systems) and "alternative onsite treatment systems" (e.g., aerobic treatment units, disinfection units, mounds, pumps, etc).[3]

3. The Problem

In 2003, the EPA noted that "the performance of onsite and clustered (decentralized) wastewater treatment systems is a national issue of great concern," that "many existing state, tribal, and local rules that regulate onsite systems are not adequate to ensure proper performance," and that such systems are used in 25% of the homes in the United States and in 33% of new construction."[4]

The Idaho Rules for Individual and Subsurface Sewage Disposal Systems ("Idaho Rules") state as their intent:

> Intent of Regulation. The Board, in order to protect the health, safety, and environment of the people of the State of Idaho establishes these rules governing the design, construction, siting and abandonment of individual and subsurface sewage disposal systems. These rules are intended to insure that blackwaste and wastewater generated in the State of Idaho are safely contained and treated and that blackwaste and wastewater contained in or discharged from each system:
> a. Are not accessible to insects, rodents, or other wild or domestic animals;
> b. Are not accessible to individuals;
> c. Do not give rise to a public nuisance due to odor or unsightly appearance;
> d. Do not injure or interfere with existing or potential beneficial uses of the waters of the State.[5]

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[2] 40 Code of Federal Regulations (CFR) 122.2.

[3] Voluntary National Guidelines for Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems (USEPA March 2003) ("EPA Guidelines"), pp. 27-29.

[4] EPA Guidelines, pp. 3-4.

[5] IDAPA 16.01.03.004.01.

The 1990 U.S. Census estimated the number of septic tanks or cesspools in Idaho at 142,879 (or 34.6% of the housing units), and a 1999 study estimated a failure rate of 20% for onsite systems in Idaho (i.e., backup, surface, or groundwater contamination). This rate is at the high end of the 10-20% failure rate that the EPA found in studies that it reviewed in 2000. The EPA noted age, hydraulic overloading (too great of a density of septic systems in a given area), design, installation, and maintenance as causes of the failures. [6]

In 2003, the EPA noted that recent data suggested that "at least 25% of onsite systems are malfunctioning to some degree," that "in many areas of the country, the local authority lack records of many of the systems within the service area," that state agencies reported to Congress in 1996 that contamination from septic systems was the second highest threat to groundwater, and that "onsite and cluster wastewater systems also contribute to contamination of drinking water sources."[7]

The "typical pollutants of concern from onsite systems" include

- Suspended solids
- Biodegradable organics (BOD, COD, TOC)
- Pathogenic organisms (virus, bacteria, parasites)
- Nitrogen (N)
- Phosphorus (P)
- Toxic organic compounds
- Heavy metals
- Dissolved inorganic compounds

New York, Colorado, Maine, Idaho, Michigan, and California each reported a significant septic related health and/or drinking water problem during 1997-2000. In Idaho, septic systems were cited in 2000 as among the probable causes of high levels of nitrate in 4% of the drinking water wells sampled in three counties according to the Idaho Farm Bureau.[8]

In 1996, Congress requested the EPA to respond to concerns related to onsite systems. In its 1997 response, the EPA concluded, among other things, that properly managed onsite systems have certain benefits:

- More cost-effective than central sewer alternatives, except in densely populated urban centers
- Longer service lives for managed onsite systems vs. unmanaged systems
- Faster response to problems; smaller problem impacts
- Increased opportunity for better watershed management
- Better ground water protection and management capabilities

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[6] Onsite Wastewater Treatment Manual (USEPA February 2002) ("EPA Manual"), pp. 1-4 to 1-7.

[7] Handbook for the Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems (USEPA February 2003) ("EPA Handbook"), pp. 9-10.

[8] EPA Handbook, p. 17.

- Increased property values

However, the EPA noted the various above-referenced problems and recommended:

- education of technical practitioners, including engineers, service providers (those responsible for site evaluation, installation, and operation/maintenance), regulators, local citizens, and political leaders who need to understand how these systems work, how they should be managed, and how they affect public health and water quality.
- Improved state and regional regulatory programs based on system performance rather than use of restrictive codes which rely on assumptions that certain site characteristics will protect public health and water resources.
- Development of effective management programs to ensure that performance requirements are met.
- Establishment of financing programs that assist local communities in creating and implementing effective management programs. [9]

This report will summarize the EPA suggested risk-based onsite management suggestions below.

4. Regulatory Framework

Federal

The EPA administers more than 20 environmentally related federal laws (and their related polices, programs, and regulations), many of which could relate to sewage issues including (i) the Clean Water Act (1977), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") (1980), and Safe Drinking Water Act (1974) and (ii) the related National Pollutant Discharge Elimination System (NPDES), Biosolids and Residuals Management, Water Quality Management (Total Maximum Daily Loads {TDMLs}, Underground Injection Control, and Nonpoint Source Control programs.

A detailed examination of these Acts, Policies, and Programs is outside the scope of this report. A fair summary for purposes of this report is that the EPA has delegated the administration of certain of these Acts, Policies, and Programs for certain types and sizes of wastewater treatment systems to state agencies. For example, a wastewater treatment system is regulated directly by the EPA if (i) it has the capacity to serve 20 or more people,[10] receives industrial or commercial wastes, or discharges pollutants from a point source to waters of the United States.[11]

[9] EPA Handbook, pp. 19-20.

[10] Underground Injection Control Program. 40 CFR 144-148.

[11] National Pollutant Discharge Elimination System (NPDES).

Therefore, for example, the County must consider these federal Acts, Policies, and Programs relating to the approval of a central onsite wastewater treatment system that serves a subdivision of eight or more homes,[12] a standard system that serves commercial uses, or an alternative system that might create a point source discharge into the Big Wood River.

Idaho

The Idaho Environmental Protection and Health Act (Idaho Code §§39-101 *et seq*.) and the "Idaho clean water act" (Idaho Code §§39-3601 *et seq.*) authorize the Idaho State Board of Health and Welfare, among things, to adopt rules and standards to protect the environment and health of the State and to regulate sewage treatment facilities and authorize the Director of the Idaho Department of Health and Welfare to enforce such Acts, Rules, Regulations, and Standards, by among other things, issuing pollution source permits and by reviewing and approving plans for proposed wastewater treatment facilities.

Pursuant to such authority, the Board of Health and Welfare has adopted the Rules for Individual/Subsurface Sewage Disposal Systems[13] and the Division of Environmental Quality of the Idaho Department of Health and Welfare has issued its Technical Guidance Manual For Individual/Subsurface Sewage Disposal Systems.[14]

The DEQ Technical Manual expressly requires that alternative systems also be approved by the applicable local Health District and that site-specific requirements be included in the permit.[15]

The Idaho Rules and the DEQ Technical Manual provide detailed provisions regarding the siting, design, installation, as-built inspection, and other permitting requirements. However, they have only a few provisions relating to ongoing operation, maintenance, or monitoring of the systems. Importantly, the Idaho Rules for more stringent local regulations, standards, and ordinances (discussed below).[16]

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[12] Based on the assumption of 2.6 persons per home.

[13] ("Idaho Rules") IDAPA 16.01.03 *et seq*.

[14] ("DEQ Technical Manual") (DEQ April 2000).

[15] DEQ Technical Manual, p. 27. All rules pertaining to a standard subsurface system shall be applicable, except as modified in this section for each alternative.

All alternative systems shall be approved for specific site use by the Health Districts in a manner consistent with the individual District's policy for use of alternative systems.

Requirements for each site-specific alternative shall be contained in the permit.

[16] IDAPA 16.01.03.002.03.

The following provisions, taken as a whole, allow the DEQ to require monitoring as a permit condition, obligate an owner to repair a failed system, allow the DEQ to inspect systems during operation, prohibit the discharge of pollutants into the groundwater as a result of a onsite system failure, make a willful or negligent violation of the Idaho Rules a misdemeanor, state that onsite systems should be inspected every 1 to 3 years, warn of the health hazards associated with failed onsite systems, and state that the sludge from onsite systems should be pumped when it is at 40% of tank capacity.

Despite these provisions and the clear intent of the Idaho Rules and DEQ Technical Manual, there appears to be no DEQ program in place to monitor the performance or maintenance of onsite systems.

The Idaho Rules provide, in relevant part:

> 16.01.03.002.04. Responsibilities.
> a. Every owner of real property is jointly and individually responsible for:
> i. Storing, treating, and disposing of blackwaste and wastewater generated on that property.
> ii. Connecting all plumbing fixtures on that property that discharge wastewater to an approved wastewater system or facility.
> iii. Obtaining necessary permits and approvals for installation o f individual or subsurface blackwaste and wastewater disposal systems.
> iv. Abandonment of an individual or subsurface sewage disposal system.
> b. Each engineer, building contractor, individual or subsurface system installer, excavator, plumber, supplier, and every other person, who for compensation shall design, construct, abandon, or provide any system or part thereof, is jointly and individually responsible for compliance with each of these rules that are (sic) relevant to that service or product.
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> 16.01.03.003.13. Failing System. Any system which exhibits one (1) or more of the following characteristics:
> a. The system does not meet the intent of these regulations as stated in Subsection 004.01.
> b. The system fails to accept blackwaste and wastewater.
> c. The system discharges blackwaste or wastewater into the waters of the State of Idaho or onto the ground surface.
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> 16.01.03.004.05. Failing System. The owner of any failing system shall obtain a permit and cause the failing system's repair:
> a. As soon as practical after the owner becomes aware of its failure; or

b. As directed in proper notice from the Director.

* * *

16.01.03.005.14. Operation, Maintenance, and Monitoring. The Director may require as a condition of issuing a permit, that specific operation, maintenance, and monitoring procedures be observed. Those procedures will be contained in the permit application.

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16.01.03.011. INSPECTIONS

01. One (1) or More Inspections Required. Such inspections as are necessary to determine compliance with any requirement or provision of these rules shall be required by the Director.

02. Duty to Uncover. The permittee shall, at the request of the Director, uncover or make available for inspection any portion or component of an individual or subsurface system which was covered or concealed in violation of these rules.

03. Advance Notice by Permittee. If an inspection requires some type of preparation, such as test hole excavation or partial construction of the system, the applicant or permittee will notify the Director at least forty-eight (48) hours in advance, excluding weekends and holidays, before the time preparation will be completed.

04. Substantiating Receipts and Delivery Slips. The permittee shall upon request of the Director provide copies of receipts, delivery slips, or other similar documents to substantiate the origin, quality, or quantity of materials used in the construction of any individual or subsurface system.

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16.01.03.012. VIOLATIONS AND PENALTIES

01. Failure to Comply. All individual subsurface or individual sewage disposal systems shall be constructed and installed according to these rules. Failure by any person to comply with the permitting, licensing, approval, installation, or variance provisions of these rules shall be deemed a violation of these rules.

02. System Operation. No person shall discharge pollutants into the underground water of the State of Idaho through an individual or subsurface sewage disposal system unless in accordance with the provisions of these rules.

03. Violation a Misdemeanor. Pursuant to Section 39-117, Idaho Code, any person who willfully or negligently violates any of the provisions of these rules shall be guilty of a misdemeanor.

The DEQ Technical Manual states, in relevant part:[17]

> The use of a septic tank system requires periodic maintenance which includes pumping out the accumulated scum and sludge, called septage. Septage, because of where it comes from, may give off offensive odors and present the health hazards of diseases. The septic tank pumper has the important task of not only helping the homeowner maintain his system, but protecting the homeowner from the various health hazards associated with the septage.
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> In order to protect and help the homeowner, the pumper needs to know something about the operation of the sewage system as well as the proper procedures for pumping and disposal of the septage. Hopefully, this manual will help the septic tank pumper get off on the right track to a successful career.
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> Many very important diseases, including any that will pass in urine and feces, can be found in sewage. Therefore, septage may contain some or all of them. The bacterial diseases of diarrhea (Salmonella, Shigella and Clostridium) and Typhoid (Salmonella typhi) may be present. Parasites, such as Pinworm, Roundworm and Hookworm can often be found, especially in the scum layer. The organisms that cause Amoebic Dysentery, Polio and Hepatitis could also exist in septage.
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> The septic tank and drainfield will work satisfactorily until such time as the sludge fills over 40% of the volume of the tank or the scum fills the air space in the tank. Before the tank reaches these levels
> it should be pumped.
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> If the tank is not pumped, it will be unable to perform its separation function and will let the solids and greases be carried out into the drainfield. There they will fill and clog the soil causing the septage to back up into the house or business, or to even overflow the tank.
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> The septic tank should be checked at least once every three years , and, preferably, once a year if the sewage system receives heavy use. Either the homeowner or the septic tank pumper can check the tank.
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> When sludge is greater than 40% of the liquid volume the tank should be pumped.

The Idaho "subdivision act" (Idaho Code §§50-130 *et seq.*) also contains important provisions requiring that a restriction be placed on any subdivision plat that

[17] DEQ Technical Manual , pp. 79-81.

requires the approval of the DEQ (or its delegate, e.g., the Health District) of onsite wastewater systems prior to recordation of the plat[18] and prohibiting any development until such approval has been obtained.[19]

South Central District Health

In 1971, Idaho created its current system of health districts, each with a district health department to "provide the basic health services of public health education, physical health, environmental health, and public health administration."[20] The seven health districts have a bit of a hybrid status. They are not part of any of the constitutional departments of the state, are not departments as provided for in IC §2402, and are not state agencies. They are authorized "government entities . . . much in the manner as other single purpose districts."[21] Idaho courts have characterized a health district as "a legislatively created administrative agency for a specific limited purpose."[22] Blaine County is one of eight counties in District No. 4 (South Central).[23]

[18] IC §50-1301 (13). Sanitary Restriction: the requirement that no building or shelter which will require a water supply facility or a sewage disposal facility for people using the premises where such building or shelter is located shall be erected until written approval is first obtained from the state board of health by its administrator or his delegate approving plans and specifications either for public water and/or sewage facilities, or individual parcel water and/or sewage facilities.

IC §50-1301 (15). Subdivision: A tract of land divided into five (5) or more lots, parcels, or sites for the purpose of sale or building development, whether immediate or future; provided that this definition shall not include a bona fide division or partition of agricultural land for agricultural purposes. A bona fide division or partition of agricultural land for agricultural purposes shall mean the division of land into lots, all of which are five (5) acres or larger, and maintained as agricultural lands. Cities or counties may adopt their own definition of subdivision in lieu of the above definition.

[19] IC §50-1326.For the purposes of sections 50-1326 through 50-1329, Idaho Code, any plat of a subdivision filed in accordance with chapter 13, title 50, Idaho Code, or in accordance with county ordinances adopted pursuant to chapter 38, title 31, Idaho Code, shall be subject to the sanitary restriction. There shall be placed upon the face of every plat prior to it being recorded by the county clerk and recorder, the sanitary restriction, except such sanitary restriction may be omitted from the plat, or if it appears on the plat, may be indorsed by the county clerk and recorder as sanitary restriction satisfied, when there is recorded at the time of the filing of the plat, or at any time subsequent thereto, a duly acknowledged certificate of approval issued by the director of the department of health and welfare, for either public water and/or public sewer facilities, or individual water and/or sewage facilities for the particular land. The owner shall have the obligation of submitting to the director all information necessary concerning the proposed facilities referred to. Such certificate of approval may be issued for the subdivision or any portion thereof. Until the sanitary restrictions have been satisfied by the filing of said certificate of approval, no owner shall construct any building or shelter on said premises which necessitates the supplying of water or sewage facilities for persons using such premises. The sanitary restrictions shall be reimposed on the plat upon the issuance of a certificate of disapproval after notice to the responsible party and an opportunity to appeal, if construction is not in compliance with approved plans and specifications, or the facilities do not substantially comply with regulatory standards in effect at the time of facility construction.

[20] IC §39-409.

[21] IC §39-401.

[22] District Board of Health v. Chancey, 94 Idaho 944, 949 (1972).

Each health district is governed by a district board of health (appointed by the boards of commissioners of the member counties), which in turn appoints a director.

The powers and duties of the board include (1) "administer and enforce all state and district health laws, regulations, and standards" and (2) "do all things required for the preservation and protection of the public health and preventive health, and such other things delegated by the director of the state department of health and welfare or the director of the department of environmental quality and this shall be authority for the director(s) to so delegate."[24]

The powers and duties of the director include "to prescribe such rules and regulations, consistent with the requirements of this chapter, as may be necessary for the government of the district, the conduct and duties of the district employees, the orderly and efficient handling of business and the custody, use and preservation of the records, papers, books and property belonging to the public health district."[25]

Thus, a district board of health both (i) performs duties delegated to it by the Department of Health and Welfare and DEQ and (ii) establishes and enforces its own district rules. Also, its power to "do all things required for the preservation and protection of the public health and preventive health" substantially overlaps with the power of a county (discussed below) to do the same.

The South Central Health District ("SCHD") has been issuing permits for onsite systems since 1972 pursuant to the Idaho Rules. SCHD has a Memorandum of Understanding ("MOU") with the DEQ that delegates the authority to SCHD to issue permits for onsite systems receiving less than 2,500 gallons per day.[26]

A violation of the Idaho Rules, DEQ Technical Manual, and/or SCHD rules is a misdemeanor, and SCHD can go to court to abate any public health nuisances.[27]

SCHD also has established and is enforcing some of its own supplemental rules with respect to onsite wastewater treatment systems ("SCHD Rules"). For example in 1977, SCHD established a 1-acre minimum lot size for onsite systems. Also in 1977, Blaine County adopted a 300-foot river setback in its Subdivision Ordinance. SCHD considers any pre-1972 systems, systems on less than one acre, and/or systems within 300 feet of a river as "non-conforming systems" and highly suspect for problems.

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[23] IC §39-408. ("District No. 5 shall include the counties of Camas, Blaine, Gooding, Lincoln, Jerome, Minidoka, Twin Falls and Cassia")

[24] IC §39-414.

[25] IC §39-413.

[26] Much of the information relating to SCHD policies is based on interviews with Bob Erickson of SCHD.

[27] IC §39-419; IC §39-420.

Another district rule adopted by SCHD relates to alternative onsite sewage systems ("AOSS"). Such a local district rule is expressly contemplated by the DEQ Technical Manual.[28] In 1996, Blaine County at the request of SCHD adopted an ordinance regulating such alternative systems (discussed below).

SCHD has adopted the position that it will not sign off on any building permit in Blaine County unless the property has, or upgrades to, an onsite system conforming to the Idaho Rules, DEQ Technical Manual, and SCHD Rules.

SCHD estimates that there are 2,500-3,000 onsite systems in Blaine County. It only has permit records since 1972. It only becomes aware of pre-1972 systems when there is a reported problem or if the owner applies for a building permit. It also has no central database of permits for standard systems. It does have a database for approximately 400 alternate onsite systems. SCHD estimates that it has records for only 70-80% of the onsite systems in Blaine County. In other words, it has no permits for an estimated 500-900 onsite systems, many of which are probably non-conforming systems pre-1972 systems. Also, based on EPA estimated overall failure rates of systems of all ages, there would be 500-750 failed systems in Blaine County at any given time.

Finally, apparently because it is neither a state agency nor a county department, SCHD has not been able to obtain access to the Blaine County Assessor records to cross check occupied properties with it permits. Also, there might be privacy concerns relating to SCHD records that must be studied relating to any sharing in "the other direction."

Blaine County

Blaine County has three ordinances that specifically address onsite wastewater treatment systems: Health and Safety Ordinance 3-5-1 to 3-5-4 (adopted as Ordinance 96-11); Zoning Ordinance 9-3-7; and Subdivision Ordinance 10-5-1.

BC 3-5-1 to 3-5-4

BC 3-5-1 to 3-5-4 ("AOSS Ordinance") provides special requirements for alternative onsite sewage systems ("AOSS") (attached as Exhibit B). The preamble to Ordinance 96-11 is informative:

> Whereas, the purpose of this ordinance is to preserve the environment, prevent pollution of the aquifer and streams by sewage discharge, and to promote the health, safety and welfare of all residents of Blaine County. There exist environmentally sensitive areas in Blaine County where the minimum requirements for standard septic systems, as set forth by the Idaho Department of Health and Welfare, cannot be met. Alternative onsite sewage systems (hereinafter referred to as "AOSS") have been

[28] DEQ Technical Manual, p. 27.

permitted in the past and may be permitted in the future. Design and construction of any AOSS is regulated by the Idaho Department of Health and Welfare. There exists, however, no mechanism for ensuring owner maintenance, or monitoring of effluent quality of such systems. Therefore, it is in the best interests of Blaine County to adopt regulations with regard to maintenance and monitoring of AOSS.

In essence, the AOSS Ordinance requires

- special approval of an AOSS by SCHD
- a $1,000 bond to assure compliance with approved design and construction
- periodic inspections by a SCHD-approved inspector at least once every five (5) years or more frequently as specified by SCHD
- testing, pumping, and repairs as required by SCHD at the owner's expense
- compliance under threat of a misdemeanor charge

In February 1999, SCHD adopted policies relating to the AOSS Ordinance, which contain relevant definitions, minimum inspection schedules (varying from every six months, one year, and five years depending on the type of system), and monitoring/sampling standards for effluent.

SCHD has attempted to review the estimated 400 AOSS on a rotating three-year schedule. Thus, it has sent notices to one-third of the owners each year reminding them of the inspection requirement. It then sends reminder letters if it has not received a copy of a satisfactory inspection report. Its notification process is manual (not computerized) and time consuming.

Approximately 75% of the inspected AOSS have had problems (electrical, damaged parts, inappropriate landscape/hardscape, etc.). SCHD has attempted to enforce the AOSS Ordinance through persuasion and has not reported any violators to the County for prosecution and has not gone to court pursuant to its nuisance abatement power.

SCHD has suspended administration of the inspection component of the AOSS Ordinance due to staff and budget reasons. SCHD feels that it cannot charge more than the state-prescribed fees for site evaluations, as-built inspections, and permits. Thus, there is no funding for inspections or enforcement.

BC 9-3-7

Zoning Ordinance 9-3-7 provides:

> **SEWAGE TREATMENT APPROVAL:** Sewage disposal facilities for all residential dwelling units must be approved either by the South Central Idaho Health District or by the Idaho Department of Health and Welfare, Division of Environment (Ord. 77-5, 3-28-77, eff. 4-7-77).

BC 10-5-1

Subdivision Ordinance 10-5-1 provides, in relevant part:

A. Other Regulations: To the extent applicable, subdivision proposals shall comply with:
   1. The following sections of this Code:
      a. Any chapter of Title 3 with the recommendations or approval of the Health District

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H. Sewage Disposal:
   1. All sewage disposal shall meet DEQ standards as administered by the South Central Health District ("SCHD") and as set forth in the Idaho Code.
   2. Unless otherwise approved by the SCHD:
      a. One acre shall be the minimum size of any lot with a septic tank-drain field sewage disposal system and;
      b. Three hundred feet (300') shall be the minimum separation between any drain filed site and a natural stream, spring or lake.
   3. A sewage district or other party acceptable to DEQ shall be organized for the operation, maintenance and on-going monitoring of any central sewage system.

Based on Ordinances 3-5-1 to 3-5-4, 9-3-7, and 10-5-1, the Blaine County Building Department requires sign-off by SCHD on all building permits. It also collects the onsite system fee and any bond amount as part of the building permit fee.

Summary of Regulation

The EPA regulates large systems, systems receiving commercial or industrial wastewater, and systems causing point-source pollution. The Idaho Rules and DEQ Technical Manual provide detailed design and siting requirements, contemplate (but do not require) regular monitoring, pumping and maintenance, and allow more stringent local standards. The DEQ has delegated authority to SCHD for systems receiving less than 2,500 gallons per day. SCHD also has adopted its own stricter standards relating to minimum lot size, conforming onsite systems for all building permits, and alternate onsite systems. Blaine County requires SCHD sign-off on all building permits and has an AOSS Ordinance that apparently is not being enforced.

5. Legal Authority for Action by County

A self-funding inspection, maintenance, and enforcement program for existing and future onsite wastewater treatment systems in Blaine County ("Program") raises several legal questions:

a. In light of the (i) extensive federal law and EPA regulations and (ii) Idaho Department of Health and Welfare codes and DEQ regulations, is this area expressly or implicitly preempted by the federal and/or state governments to the preclusion of any action at a local level?

b. Should the County raise the funds required for the Program by (i) regulation (e.g., permit fees) or (ii) a some sort of special taxing district? (based on the premise that the Program should be self-funding, this Report will not analyze County-wide revenue sources such as the annual levy, bonds, etc)

c. Should there be one Program or separate Programs for existing and future systems)?

d. What authority does the County have to force owners of existing systems pay a fee for the Program?

e. What authority does the County have to enforce compliance with the Program?

Preemption

Federal

As discussed above, the EPA has delegated certain enforcement actions to the states, including onsite systems receiving less than 2,500 gallons per day. Further, recent EPA publications have noted that:

> legal authority for regulating onsite and clustered (decentralized) wastewater treatment systems generally rests with state, tribal, and local governments[29]
>
> and
>
> USEPA recognizes that management programs will vary widely across the Nation. Some communities will elect to adopt a cooperative management program that organizes and coordinates the activities of the regulatory authority, water resource agency, planning department, service providers, and other interested parties (e.g., volunteer monitoring groups, homeowner associations, sanitation districts, etc.). Other jurisdictions might have the

[29] EPA Guidelines, p. 8.

> resources to develop a responsible management entity (RME) with the technical, managerial, and financial capacity to ensure long-term, cost-effective management, operation, and maintenance of all systems within the designated service area. The exact configuration of local management programs will be based on the resources available, the nature of public health and water resource threats posed by onsite systems, and the creativity and commitment of the regulatory authority and other interested parties.[30]

Thus, the risk of federal preemption of the Program seems minimal.

State

Idaho has adopted the doctrine of "implied preemption." Caesar v. State, 101 Idaho 158 (1980) ("Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities], a [local] ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state"). See, also Envirosafe Servs. v. County of Owyhee, 112 Idaho 687, 688-689 (Idaho, 1987) (nature of regulation area {disposal of hazardous waste}, need for uniform regulation, pervasive state statutes, and absence of any express language led to a holding of state preemption).

However, the DEQ has delegated authority for onsite systems receiving less than 2,500 gallons per day to the Health Districts. Also, the Idaho Rules expressly provide for Health Districts to adopt their own rules regarding alternative onsite systems based on local, site-specific conditions and, most importantly, expressly contemplate and allow more strict rules at the local level:

> 16.01.03.002.03 Conflict of Rules, Standards, and Ordinances. In any case where a provision of these regulations is found to be in conflict with a provision of any state or local zoning, building, fire, safety, or health regulation, standard, or ordinance, the provision which, in the judgement (sic) of the Director, establishes the higher standard for the promotion and protection of the health and safety of the people, shall prevail.

Thus, state preemption also appears unlikely.

SCHD – New Policies

Perhaps the simplest approach would be for the County to persuade SCHD to adopt stricter polices relating to onsite systems and to expand the AOSS inspection program to standard systems. However, as noted above, SCHD feels that it does not have the authority to charge fees sufficient to support the inspection, monitoring, and enforcement aspects of the Program. Therefore, such additional work by SCHD would require additional funding of SCHD by the County as part of its annual budget.

[30] EPA Handbook, p. 11.

A more practical approach would be to work with SCHD to adopt the desired policies and to reference such policies in the independent County Program, which would be self-funding and able to reimburse SCHD for any additional inspection and/or monitoring work.

Constitution - General Authority

Idaho Constitution, Article XII, §2 provides:

> Local police regulations authorized
>
> Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

Idaho courts have given broad interpretation to this constitutional grant of power and have held that

> There are three general restrictions that apply to ordinances enacted under the authority conferred by this constitutional provision: (1) the ordinance or regulation must be confined to the limits of the governmental body enacting the same, (2) it must not be in conflict with other general laws of the state, and (3) it must not be an unreasonable or arbitrary enactment. See, e.g., Hobbs v. Abrams, 104 Idaho 205, 207 (1983).

An ordinance excluding the incorporated cities in Blaine County, establishing the higher standards contemplated by the Idaho Rules, and containing appropriate findings of fact to show its reasonable relationship to proper County concerns would clearly seem to a valid exercise of this constitutional authority.

Idaho Code - General Authority

Idaho Code § 31-601 provides:

> Every county a body corporate
>
> Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed.

Idaho courts have held that (i) a county is a political subdivision of the state, (ii) it has authority under this code section to serve the public interest, (iii) the board of county commissioners is the legislative branch of county government and responsible for promoting the general welfare, and (iv) the board of county commissioners has both

express and implied power to promote the general welfare of the county. See, e.g., Hansen v. White, 114 Idaho 907, 911 (1988).

The analysis of the Program under this Idaho Code provision would be similar to the above Idaho Constitutional provision.

Idaho Code - LLUPA Authority

The Idaho Local Land Use Planning Act contains several provisions relevant to parts of the Program.[31] However, these provisions appear most useful when considering the application of the Program to future development. It would appear that the County should rely on other authority in applying the Program to existing development.

IC § 67-6513 ("Subdivision Ordinance") allows the County to establish standards for subdivision permits under the Idaho "subdivision act" to provide for mitigation of the subdivision on the ability of the County to "deliver services without compromising the quality of service delivery to current residents or imposing substantial additional costs upon current residents to accommodate the propose subdivision."

IC § 67-6518 ("Standards") allows the County to adopt standards for many things, including "water systems, sewer systems, and storm drainage systems" in "zoning, subdivision, planned unit development, or separate" ordinances. My research disclosed only one reported case involving this section, and it did not relate to the substance of such standards.

The County apparently relied on these LLUPA code sections in enacting the 10-5-1 "Administrative Standards" in its Subdivision Ordinance. 10-5-1 H (3) contains a requirement of a party responsible for the operation, maintenance, and monitoring of central onsite systems. The County could adopt stricter general onsite standards and, perhaps a requirement of ongoing monitoring for standard onsite systems under this provision. However, this code section does not seem to provide a funding mechanism and appears difficult to apply to existing systems.

IC §§ 67-6511A ("Development Agreements") and 67-6515 ("Planned Unit Developments") provide wide latitude for the County to negotiate agreements with developers seeking such permits that would impose stricter onsite standards and require ongoing fees, inspection, monitoring, and repairs under the Program. Such fees could be collected through owner associations and enforced through recorded DA or PUD Agreements. Again, these code sections apparently would not enable the application of the Program to existing development.

[31] IC §67-6501 *et seq.*

Idaho Code - Impact Fees

The Idaho Development Impact Fee Act[32] provides for impact fees to, among other things, "ensure adequate public facilities are available to serve new growth and development" and "require that those who benefit from new growth and development pay a proportionate share of the cost of new public facilities needed to serve new growth and development."

This Act could enable the County to require developers to "buy-into the Program," with upfront fees sufficient to capitalize it. However, because of the detailed and comprehensive requirements of this section (e.g., definition of public facilities, capital improvement plan, advisory committee, etc.), the inability to generate fees from existing development, and the possible difficulty in bringing the Program within the definition of public facilities, this Report does not recommend this approach

Idaho Code - Nuisance Abatement

IC §§ 52-101 defines a public nuisance such that a failing onsite system would probably be deemed a public nuisance and give the County the power to abate such nuisance.[33]

This power is additional authority for the ability of the County to enforce the Program, but it does not directly contribute to funding of the Program.

Idaho Code – Sewer District

IC §§ 42-3201 *et seq.* (water and sewer districts) provide for the organization of sewer districts by property owners within the proposed district "to provide for sewage disposal." IC § 31-877 (powers of a county board of commissioners) extends to a county board of commissioners the authority granted to sewer districts as follows:

> The boards of county commissioners in their respective counties shall have the authority to provide necessary water and sewer services to any part of the county which does not receive water and sewer services, or any part of the county where a water and sewer or a water or sewer district has

[32] IC §§ 67-8201 *et seq*.

[33] IC §52-101. NUISANCE DEFINED. Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

IC § 52-102. PUBLIC NUISANCE. A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

IC §52-205. ABATEMENT BY PUBLIC BODY OR OFFICER. A public nuisance may be abated by any public body or officer authorized thereto by law.

> been dissolved pursuant to chapter 41, title 63, Idaho Code. For purposes of this section, a board of county commissioners shall have the authority granted to water and sewer districts pursuant to chapter 32, title 42, Idaho Code, and the authority granted to municipalities pursuant to the provisions of title 50, Idaho Code.

My research disclosed no reported cases on §31-877, which was adopted in 2001 as an emergency measure. The legislative intent of the section is as follows (emphasis added):[34]

> Statement of Purpose / Fiscal Impact
> STATEMENT OF PURPOSE
> RS 10757C1
> **The purpose of this bill is to enable a county to operate a sewer & water system in the unincorporated areas of a county**. In addition, although counties already have the authority to operate distressed or dissolved districts, this bill clarifies a gray area in the law by providing the guidance and procedures to operate such systems.
>
> Failures in existing districts have caused counties to take action to protect the citizenry and assume the responsibility for operation of the districts.
> FISCAL IMPACT
> There is no impact to the state general fund or any taxing districts.

The language of the section deserves close analysis to determine the process and authority of a county sewer "district" organized pursuant to §31-877.

The water and sewer district chapter of Idaho Code, in summary, provides for the following process for forming a district:

- A petition by 10% of the property owners in the proposed district
- The exclusion of any "single tract or parcel of property containing five (5) acres or more" unless such owners consents to inclusion[35]
- A hearing in district court on the petition with an opportunity for objections by property owners within the proposed district
- An election on the issue of formation of the district (which must pass by a majority of votes cast) and on five proposed board members.
- An order of the district court declaring the district organized[36]

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[34] IDAHO 56TH IDAHO LEGISLATURE -- FIRST REGULAR SESSION, CHAPTER NO. 184, HOUSE BILL NO. 209, 2001 Ida. ALS 184; 2001 Idaho Sess. Laws 184; 2001 Ida. Ch. 184; 2001 Ida. HB 209.

[35] IC §42-3204.

[36] IC §§ 42-3206-3207.

The language of §31-877 suggests that a board of commissioners is not required to follow such a process or to actually organize a formal district. The section states that a board of commissioners (i) "shall have the authority to provide necessary water and sewer services to any part of the county which does not receive water or sewer services" and (ii) "shall have the authority granted to water and sewer districts." There is no mention of any entity other than the board of commissioners or of any organizational requirements.

My preliminary conclusion is that §31-877 is intended to grant directly to a county board of commissioners the powers set forth in the water and sewer district chapter, including §42-3212 (general powers) and §§ 42-3213 to 42317 (taxes) (attached as Exhibit C). In other words, the Board could simply operate a "sewer district" after adopting an appropriate ordinance. Additionally, perhaps an Attorney General opinion should be considered.

Apart from the process, an important threshold question is whether an "onsite sewer district" that inspects, monitors, maintains, repairs, and (perhaps) pumps onsite systems would fall within the definition of providing "necessary . . . sewer services." These actions certainly are "services" in the general sense. However, one could argue that "services" is used in an infrastructure sense (e.g., water service, electrical service, etc.).

An additional question would be whether the services relate to a "sewer." "Sewage," the adjective is defined in the Idaho Rules as "sewage has the same meaning as wastewater," which clearly includes the inflow into onsite systems. "Sewer," the noun, is not defined in the Idaho Rules. However, the Idaho Rules, in its section on septic tank volume requirements, uses the phrase "Travel Trailer park with Sewer and Water Hook-up" as one of the categories.

The DEQ Technical Manual does not directly define "sewer," but uses it to describe at least four separate components relevant to this Report: (i) the pipe carrying the wastewater from the building to the septic tank ("building sewer")[37], (ii) the septic tank,[38] (iii) the drain field ("effluent sewer")[39], and (iv) "public sewer."[40] The first three of these components clearly relate to onsite systems. Further, the DEQ Technical Manual lists a "water or sewer district" as an acceptable entity to be responsible for the maintenance of a "packaged" alternative onsite system.[41]

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[37] DEQ Technical Manual, pp. 21, 22, 80, 98 (definition), 83, and 116.

[38] DEQ Technical Manual, p. 19.

[39] DEQ Technical Manual, p. 119.

[40] DEQ Technical Manual, pp. 33, 44, and 138.

[41] DEQ Technical Manual, p. 38.

It would appear that the intended scope of the Program would qualify it as "providing sewer services."

6. Analysis of Options

Threshold Legal Questions

This Report answers the above-referenced threshold legal questions as follows:

a. Federal and/or state preemption of the Program appears unlikely.

b. The County appears to have adequate authority to fund the Program either (i) through its constitutional and statutory express and implied regulatory power to require onsite wastewater treatment systems permits with annual renewal fees or (ii) through its statutory power to establish an onsite sewer "district." The onsite sewer "district" apparently would be the first of its kind, but perhaps has the most specific authorization. The decision regarding which method to use would appear to be based on practical and/or political considerations.

c. An integrated Program for both existing and future onsite systems seems preferable since it would avoid duplication, possible inconsistent standards, and confusion. Thus, the use of Zoning and Subdivision Ordinances appears to be less favorable than other methods.

d. The County has broad general powers to protect the health and welfare of the residents and visitors of the County and broad specific powers to exercise the powers of a sewer district. These powers would appear adequate to justify requiring existing property owners with onsite systems to pay fees under a permit and/or County onsite sewer district.

e. The County has broad general powers to protect the health and welfare of the residents and visitors of the County, specific power to abate nuisances, and broad specific powers to exercise the power of a sewer district. These powers would appear adequate to enable the County to enforce the Program.

Permit vs. Onsite Sewer District

It appears that IC §31-877 authorizes the County to exercise the powers of a sewer district without following the process of establishing a formal district. If further research and/or an Attorney General Opinion confirms this position, it would appear that the County could proceed with either a permit or an "onsite sewer district" by adopting an ordinance. If the County must follow the formal process of establishing a district, the exclusion of 5-acre or more parcels might lead to a conclusion that the County should use the permit process.

County Health Ordinances

The County has adopted two chapters to Title 3 (Health and Safety) that might be instructive to the issues of this Report.

BC 3-2-1 to 3-24 (Noxious Weeds) relied on IC §§22-2401 *et seq.* (Agriculture-Horticulture - Noxious Weeds) to establish a "Noxious Weed Extermination Area encompassing the entire County" and to put the burden of exterminating the noxious weeds on relevant property owners. The enabling sections in the Idaho Code relating to the County's power to establish a sewer district are broader than these sections on noxious weeds.

BC 3-6-1 to 3-6-3 (Emergency 911 Ordinance) relied on IC §31-4803 (Emergency Communications Act) in establishing a county-wide (excepting Yale) monthly fee on residents using cell phones, which is similar to a special "Emergency 911 district." Again, the enabling sections in the Idaho Code relating to the County's power to establish a sewer district are broader than the section the Idaho Code on E911.

BC 3-5-1 to 3-5-4 (Alternative Onsite Sewage Systems) (discussed above) also requires property owners to incur the expenses of periodic inspections and required maintenance and repair of AOSS.

This Report recommends that the County either replace BC 3-5-1 to 3-5-4 with a revised chapter or add a new Chapter 7 to Title 3 of the Blaine County Code either establishing a permit system with annual fees or an onsite sewer district for the unincorporated areas of Blaine County to implement the Program.

7. Recommended Components

The EPA has recommended five management models for onsite systems (attached as Exhibit D). The models contain increasing levels of oversight based on risk assessments. It appears that the Program sought by the Board would fall into either Model 4 or Model 5. Model 3 appears very similar to the current BC AOSS Ordinance. Model 4 requires a "responsible management entity" (RME), which could be a private entity. Model 5 would be similar to a sewer district.

Based on an review of the materials and sources cited herein, this Report recommends that the Program start with a comprehensive (i) inventory of all developed property in the unincorporated areas of the County to determine the nature and extent of onsite systems in such areas and to cross-check such systems with SCHD permits and (ii) review of environmentally sensitive areas and areas with high densities of onsite systems.

The EPA has offered the following suggestions for management of onsite systems:

> The regulatory authority might choose to retain its power to issue system construction and operating permits, but delegate responsibilities for

system design, inspection, and operation and maintenance to a management entity that could collect fees, enter into contracts, or receive funding for their services through other means. In all cases, the management entity must of itself or in concert with its partners have the required powers listed below to effectively accomplish its goals. For example, a stand-alone responsible management entity might be charged with:

- Authority to own, purchase, lease and rent both real and personal property
- Right of access to the systems it governs by covenant, ordinance, or other suitable instrument
- Eligibility for loans and grants for construction of facilities
- Ability to enter into contracts and to undertake debt obligations, either by borrowing or issuing
- Authority to set and collect charges for system usage and/or oversight, set the value of such benefit, and assess or collect the cost from each property owner that is benefited
- Power to make rules and regulations regarding use of on-site/small-scale systems
- Power to require the abatement of malfunctioning systems.

Management programs that requires system owners to assume full responsibility for operation and maintenance have proven to be largely ineffective (Herring, 2001). Therefore, the management models presented in the USEPA voluntary guidelines recommend system inventories and maintenance reminders to system owners as the foundation upon which management programs should be built. At the other end of the management continuum, the guidelines suggest a program wherein a sanitation district or other entity owns, operates, and maintains onsite and cluster systems and charges users a monthly fee in a manner similar to conventional sewage collection and treatment operations. The middle ranges of the management continuum recommend required maintenance contracts for higher risk systems and revocable, renewable operating permits where appropriate. Again, the key consideration in developing, implementing, and sustaining a management program is protecting public health and water resources.[42]

[42] EPA Handbook, p. 21.

8. Conclusion

The conclusions of this Report are that (i) existing State of Idaho rules, which could require such inspections, are not being fully utilized, (ii) state rules allow for more stringent local rules, (iii) the County has broad powers to address such health and welfare issues by regulation and permits, (iv) the County can also exercise the powers of an "onsite sewer district" to address such issues, and (v) the County could implement the Program as either a permit requirement or an "onsite sewer district" pursuant to either a revised Chapter 5 or a new Chapter 7 of Title 7 (Health and Safety) of Blaine County Codes.

Exhibit A
DEQ Definitions
(IDAPA 16.01.03.003.01-.38)

01. Abandoned System. A system which has ceased to receive blackwaste or wastewater due to diversion of those wastes to another treatment system or due to termination of waste flow.

02. Alternative System. Any system for which the Department has issued design guidelines or which the Director judges to be a simple modification of a standard system.

03. Authorized or Approved. The state of being sanctioned or acceptable to the Director as stated in a written document.

04. Blackwaste. Human body waste, specifically excreta or urine. This includes toilet paper and other products used in the practice of personal hygiene.

05. Blackwater. A wastewater whose principal pollutant is blackwaste; a combination of blackwaste and water.

06. Board. Idaho State Board of Health and Welfare.

07. Building Sewer. The extension of the building drain beginning five (5) feet outside the inner face of the building wall.

08. Central System. Any system which receives blackwaste or wastewater in volumes exceeding twenty-five hundred (2500) gallons per day; any system which receives blackwaste or wastewater from more than two (2) dwelling units or more than two (2) buildings under separate ownership.

09. Construct. To make, form, excavate, alter, expand, repair, or install a system, and their derivations.

10. Director. The Director of the Idaho Department of Health and Welfare or the Director's designee or authorized agent.

11. Existing System. Any system which was installed prior to the effective date of these rules.

12. Expand. To enlarge any non-failing system.

13. Failing System. Any system which exhibits one (1) or more of the following characteristics:

a. The system does not meet the intent of these regulations as stated in

Subsection 004.01.

b. The system fails to accept blackwaste and wastewater.

c. The system discharges blackwaste or wastewater into the waters of the State of Idaho or onto the ground surface.

14. Ground Water. Any water of the state which occurs beneath the surface of the earth in a saturated geological formation of rock or soil.

15. High Ground Water Level - Normal, Seasonal. High ground water level may be established by the presence of low chroma mottles, actual ground water monitoring or historic records.

a. The normal high ground water level is the highest elevation of ground water that is maintained or exceeded for a continuous period of six (6) weeks a year.

b. The seasonal high ground water level is the highest elevation of ground water that is maintained or exceeded for a continuous period of one (1) week a year.

16. High Water Mark. The line which the water impresses on the soil by covering it for sufficient periods of time to prevent the growth of terrestrial vegetation.

17. Individual System. Any standard, alternative or subsurface system which is not a central system.

18. Install. To excavate or to put in place a system or a component of a system .

19. Installer. Any person, corporation, or firm, engaged in the business of excavation for, or the construction of indvidual (sic) or subsurface sewage disposal systems in the State.

20. Large Soil Absorption System A large soil absorption system is a subsurface sewage disposal system designed to receive two thousand five hundred (2,500) gallons of wastewater or more per day, including where the total wastewater flow form the entire proposed project exceeds two thousand five hundred (2,500) gallons per day but the flow is separated into absorption modules which receive less than two thousand five hundred (2,500) gallons per day.

21. Limiting Layer. A characteristic subsurface layer of material which will severely limit the capability of the soil to treat or absorb wastewater, including but not limited to, water tables, fractured bedrock, fissured bedrock, excessively permeable material and relatively impermeable material.

22. Mottling. Irregular areas of different color in the soil that vary in contrast, density number and size. Mottling generally indicates poor aeration and impeded drainage.

23. New System. A system which is or might be authorized or approved on or after

the effective date of these rules.

24. Non-Discharging System. Any system which is designed and constructed to prevent the discharge of blackwaste or wastewater.

25. Permit. An individual or subsurface system installation permit or installer's registration permit.

26. Pollutants. Any chemical, biological, or physical substance whether it be solid , liquid, gas, or a quality thereof, which if released into the environment can, by itself or in combination with other substances, create a public nuisance or render that environment harmful, detrimental, or injurious to public health, safety or welfare or to domestic, commercial, industrial, agricultural, recreational, aesthetic, or other beneficial uses.

27. Public System. Any system owned by a county, city, special service district, or other governmental entity or Indian tribe having the authority to dispose o f blackwaste or wastewater; a municipal wastewater treatment facility.

28. Repair. To remake, reform, replace, or enlarge a failing system or any component thereof as is necessary to restore proper operation.

29. Scarp. The side of a hill, canyon, ditch, river bank, road cut or other geological feature characterized by a slope of forty five (45) degrees or more from the o horizontal.

30. Sewage. Sewage has the same meaning as wastewater.

31. Soil Texture. The relative proportion of sand, silt, and clay particles in a mass of soil.

32. Standard System. Any system recognized by the Board through the adoption of design and construction regulations.

33. Subsurface System. Any system with a point of discharge beneath the earth' s surface.

34. Surface Water - Intermittent, Permanent, Temporary.

a. Any waters of the state which flow or are contained in natural or man-made depressions in the earth's surface. This includes, but is not limited to, lakes, streams, canals, and ditches.

b. An intermittent surface water exists continuously for a period of more than two (2) months but not more than six (6) months a year.

c. A permanent surface water exists continuously for a period of more than six (6) months a year.

d. A temporary surface water exists continuously for a period of less than two

(2) months a year.

35. System. Beginning at the point of entry physically connected piping, treatment devices, receptacles, structures, or areas of land designed, used or dedicated to convey, store, stabilize, neutralize, treat, or dispose of blackwaste or wastewater.

36. Wastewater. Any combination of liquid or water and pollutants from activities and processes occurring in dwellings, commercial buildings, industrial plants , institutions and other establishments, together with any groundwater, surface water, and storm water that may be present; liquid or water that is chemically, biologically, physically or rationally identifiable as containing blackwater, gray water or commercial or industrial pollutants; and sewage.

37. Waters of the State. All the accumulations of water, surface and underground, natural and artificial, public and private or parts thereof which are wholly o r partially within, which flow through or border upon the State of Idaho.

38. Water Table. The surface of an aquifer.

Exhibit B
AOSS Ordinance
(BC 3-5-1 to 3-5-4)

ALTERNATIVE ON-SITE SEWAGE SYSTEMS (AOSS)

3-5-1: DESIGN AND CONSTRUCTION:
Authorization for the construction of an AOSS shall be obtained from the Idaho Department of Health and Welfare through the South Central District Health Department (hereinafter referred to as "SCDHD"). The design and construction of such systems shall conform to such regulations, specifications, or guidelines as may be adopted and amended from time to time by the Idaho Department of Health and Welfare's Technical Guidance Manual for Individual and Subsurface Sewage Disposal. To assure compliance with approved design and construction methods, a surety of one thousand dollars ($1,000.00) shall be paid by the lot owner or authorized agent to the County Building Department at the time of building permit application. In circumstances where no building permit is required by Blaine County, such as for private development on U.S. Forest Service-leased lands, said surety shall be paid to the Blaine County Building Department prior to issuance of a sewage permit by SCDHD and commencement of construction of any AOSS. The surety shall be refunded by the County to the owner or authorized agent after notification of inspection and approval by the SCDHD. In the event the owner or agent does not request inspection of the system for which the surety was posted within three (3) years of the date of payment of said surety, the County shall give notice to the owner or authorized agent that unless said required inspection is requested of SCDHD within ninety (90) days of receipt of said notice that said surety shall be forfeited to the County and shall thereafter be nonrefundable. A surety shall not be required to be paid by lot owners for repair or replacement of existing on-site sewage disposal systems. (Ord. 96-11, 10-15-1996)

3-5-2: MAINTENANCE AND MONITORING:
It shall be the responsibility of the property owner to maintain all AOSS in good working order. At least once every five (5) years (or other time period specified by SCDHD, depending on the requirements of the particular system) the property owner shall cause the AOSS to be inspected by an SCDHD-approved inspector. The property owner shall bear the costs of the inspection, sampling of effluent (if required), and any repairs or modifications deemed necessary by SCDHD in order to find said system in good working order. (Ord. 96-11, 10-15-1996)

3-5-3: COMPLIANCE AND ENFORCEMENT:
It shall be a misdemeanor to use a malfunctioning AOSS and/or to fail to cause the AOSS to be inspected, repaired or modified as required herein. (Ord. 96-11, 10-15-1996)

3-5-4: LIABILITY:
In no case shall Blaine County, the South Central District Health Department, or any of their officers be held liable for any malfunctioning or period of nonuse of the AOSS. (Ord. 96-11, 10-15-1996)

Exhibit C
Sewer District Powers
(Idaho Code, Title 42, Chapter 32)

42-3212. GENERAL POWERS OF BOARD.

For and on behalf of the district the board shall have the following powers:

(a) To have perpetual existence;

(b) To have and use a corporate seal;

(c) To sue and be sued, and be a party to suits, actions and proceedings;

(d) Except as otherwise provided in this chapter, to enter into contracts and agreements, cooperative and otherwise, affecting the affairs of the district, including contracts with the United States of America and any of its agencies or instrumentalities, and contracts with corporations, public or private, municipalities, or governmental subdivisions, and to cooperate with any one (1) or more of them in building, erecting or constructing works, canals, pipelines, sewage treatment plants, and other facilities within or without the district. Except in cases in which a district will receive aid from a governmental agency, a notice shall be published for bids on all construction contracts involving an expense of fifteen thousand dollars ($15,000) or more for labor, materials and equipment, which sum shall exclude design costs, bid advertising and related bidding expenses. The district may reject any and all bids, and if it shall appear that the district can perform the work or secure material for less than the lowest bid, it may proceed so to do;

(e) To borrow money and incur indebtedness and evidence the same by certificate, notes or debentures, and to issue bonds, in accordance with the provisions of this chapter;

(f) To acquire, dispose of and encumber real and personal property, water, water rights, water and sewage systems and plants, and any interest therein, including leases and easements within or without said district;

(g) To refund any bonded indebtedness of the district without an election; provided, however, that the obligations of the district shall not be increased by any refund of bonded indebtedness. Otherwise, the terms and conditions of refunding bonds shall be substantially the same as those of an original issue of bonds;

(h) To have the management, control and supervision of all the business and affairs of the district, and the construction, installation, operation and maintenance of district improvements therein or therefor;

(i) To hire and retain agents, employees, engineers and attorneys;

(j) To have and exercise the power of eminent domain in the manner provided by law for the condemnation of private property for public use to take any property necessary to the exercise of the powers herein granted, both within and without the district;

(k) To construct and maintain works and establish and maintain facilities across or along any public street or highway, and in, upon, or over any vacant public lands, which public lands are now, or may become, the property of the state of Idaho, and to construct works and establish and maintain facilities across any stream of water or watercourse, and to maintain access to facilities and works by the removal of snow from roads and lands; provided, however, that the district shall promptly restore any such street or highway to its former state of usefulness as nearly as may be, and shall not use the same in such manner as to completely or unnecessarily impair the usefulness thereof;

(l) To fix and from time to time to increase or decrease water and sewer rates, tolls or charges for services or facilities furnished by the district, and to pledge such revenue for the payment of any indebtedness of the district. The board shall fix rates, tolls and charges and the time or times for the payment thereof. All such rates, tolls and charges not paid within thirty (30) days after the date fixed for the payment thereof shall become delinquent; the board shall certify all such delinquent rates, tolls and charges to the tax collector of the county by the district, not later than the first day of August and shall be, by said tax collector, placed upon the tax roll and collected in the same manner and subject to the same penalties as other district taxes; provided, however, that special assessments certified to the tax collector which are placed on property qualifying for a hardship exemption may be returned to the taxing district from which they originated if the special assessments are not paid within three (3) years. The date of priority of such lien shall be the date upon which such charge becomes delinquent. The board shall shut off or discontinue service for delinquencies in the payment of such rates, tolls or charges, or in the payment of taxes levied pursuant to this chapter, and prescribe and enforce rules and regulations for the connection with and the disconnection from properties of the facilities of the district. For health and sanitary purposes the board shall have the power to compel the owners of inhabited property within a sewer district to connect their property with the sewer system of such district, and upon a failure so to connect within sixty (60) days after written notice by the board so to do the board may cause such connection to be made and a lien to be filed against the property for the expense incurred in making such connection, provided, however, that no owner shall be compelled to connect his property with such system unless a service line is brought, by the district, to a point within two hundred (200) feet of his dwelling place;

(m) To adopt and amend bylaws not in conflict with the constitution and laws of the state for carrying on the business, objects and affairs of the board and of the district;

(n) To have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted herein. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this chapter.

42-3213. TAXES.

In addition to the other means providing revenue for such districts as herein provided, the board shall have power and authority to levy and collect ad valorem taxes on and against all taxable property within the district.

42-3214. LEVY AND COLLECTION OF TAXES.

To levy and collect taxes as herein provided, the board shall, in each year, determine the amount of money necessary to be raised by taxation, taking into consideration other sources of revenue of the district, and shall fix a rate of levy which, when levied upon every dollar of assessed valuation of taxable property within the district, and with other revenues will raise the amount required by the district annually, to supply funds for paying expenses of organization and the costs of construction, operating and maintaining the works and equipment of the district, and promptly to pay in full, when due, all interest on the principal of bonds and other obligations of the district, and in the event of accruing defaults or deficiencies, an additional levy may be made as provided in section 42-3215. The board shall, on or before the first day of September of each year, certify to the board of county commissioners of each county within the district, or having a portion of its territory within the district, the rate so fixed with directions that at the time and in the manner required by law for levying taxes for county purposes, such board of county commissioners shall levy such tax upon the assessed valuation of all taxable property within the district, in addition to such other taxes as may be levied by such board of county commissioners at the rate so fixed and determined.

42-3215. LEVIES TO COVER DEFAULTS AND DEFICIENCIES.

The board in certifying annual levies as herein provided, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts, maturing bonds and interest on bonds, and deficiencies and defaults of prior years, and shall make ample provision for the payment thereof. In case the moneys produced from such levies, together with other revenues of the district are not sufficient punctually to pay the annual instalments (sic) on its contracts or bonds, and interest thereon, and to pay defaults and deficiencies, then the board shall make such additional levies of taxes as may be necessary for such purposes, and notwithstanding any limitations, such taxes shall be made and continue to be levied until the indebtedness of the district shall be fully paid.

42-3216. OFFICERS TO LEVY AND COLLECT TAXES.

It shall be the duty of the body having authority to levy taxes within each county, to levy the taxes provided in this act and it shall be the duty of all officials charged with the duty of collecting taxes to collect such taxes at the time and in the form and manner and with like interest and penalties as other taxes are collected and when collected to pay the same to the district ordering its levy and collection, and the payment of such collections shall be made monthly to the treasurer of the district and paid into the depository thereof to the credit of the district.

42-3217. SINKING FUND.
Whenever any indebtedness has been incurred by a district, it shall be lawful for the board to levy taxes and collect revenue for the purpose of creating a sinking fund in such amount sufficient to meet the payments of principal and interest on such indebtedness as the same matures, and to constitute a sinking fund for the payment of the principal amount of the indebtedness within thirty (30) years from the time of contracting the indebtedness evidenced thereby and in accordance with the provisions made for the payment of the principal and interest of such indebtedness and also to constitute a sinking fund for payment of the principal thereof, and theretofore provided by resolution pursuant to section 42-3222, Idaho Code, and as required by the constitution and laws of the state of Idaho.

Exhibit D
EPA Onsite Management Models
(EPA Guidelines, pp. 18-20)

As a minimum level of management, EPA recommends **Model 1** - The Homeowner Awareness Model. This program specifies appropriate management practices where treatment systems are owned and operated by individual property owners in areas of low environmental sensitivity, i.e., no restricting site or soil conditions such as shallow water tables or drinking water wells within locally determined horizontal setback distances. This model is applicable where treatment technologies are limited to conventional systems, which are passive and robust treatment systems that can provide acceptable treatment under suitable site conditions despite a lack of attention by the owner. Failures that might occur and continue undetected will pose a relatively low level of risk to public health and water resources. The objectives of this management model are to ensure that all systems are sited, designed, and constructed in compliance with sound, prevailing rules; all systems are documented and inventoried by the regulatory authority; and system owners are informed of the maintenance needs of their systems through timely reminders. The model is intended to provide an accurate record of the types and location of installed systems, to raise homeowners' awareness of basic system maintenance requirements, and to better ensure that the homeowners attend to those deficiencies that overtly threaten public health. This model, like all management programs described in this guidance, suggests the use of only trained and licensed/certified service providers. This model is a starting point for enhancing management programs because it provides communities with a good database of systems and their application for determining whether increased management practices are necessary.

Model 2 - The Maintenance Contract Model
EPA recommends Model 2 - The Maintenance Contract Model where more complex system designs are employed to enhance the capacity of conventional systems to accept and treat wastewater or where small clusters are used. For example, pretreating wastewater to remove nonbiodegradable materials and particulate matter that typically pass through a septic tank may enhance subsurface infiltration system performance on marginally suitable sites (sites with limited area, slowly permeable soils, or shallow water tables). However, such pretreatment units can have mechanical components and sensitive treatment processes, which require routine observation and maintenance if they are to perform satisfactorily. Maintenance of these more complex systems is critical to sustaining acceptable protection in these areas of greater environmental sensitivity. Therefore, these systems should be allowed only where trained operators are under contract to perform timely operation and maintenance. The objectives of this model build on the Homeowner Awareness Model by ensuring that property owners maintain maintenance contracts with trained operators.

Model 3 - The Operating Permit Model

EPA recommends Model 3 - The Operating Permit Model where sustained performance of onsite wastewater treatment systems is critical to protect public health and water quality. Examples of locations where this program might be appropriate include areas adjacent to estuaries or lakes where excessive nutrient concentrations may be a concern or situations where a source water assessment has identified onsite systems as potential threats to drinking water supplies. EPA strongly recommends that this be the minimum model used where large-capacity systems or systems treating high-strength wastewaters are present. EPA has determined not to regulate large-capacity onsite systems under the Underground Injection Control program at this time based on the belief that implementation of these Management Guidelines can ensure adequate protection of public health and the environment.(10) A principal objective of this management program is to ensure that the onsite wastewater treatment systems continuously meet their performance criteria. Limited-term operating permits are issued to the property owner and are renewable for another term if the owner demonstrates that the system is in compliance with the terms and conditions of the permit. In subareas where it is appropriate to use conventional onsite system designs, the operating permit may contain only a requirement that routine maintenance be performed in a timely manner and the condition of the system be inspected periodically. With complex systems, the treatment process will require more frequent inspections and adjustments, so process monitoring may be required. An advantage to implementing the program elements and activities of this management program is that the design of treatment systems is based on performance criteria that are less dependent on site characteristics and conditions. Therefore, systems can be used safely in more sensitive environments if their performance meets those requirements reliably and consistently. The operating permit provides a mechanism for continuous oversight of system performance and negotiating timely corrective actions or levying penalties if compliance with the permit is not maintained. To comply with these performance standards, the property owner should be encouraged to hire a licensed maintenance provider or operator.

Model 4 - The Responsible Management Entity (RME) Operation and Maintenance Model

EPA recommends Model 4 - The Responsible Management Entity (RME) Operation and Maintenance Model where large numbers of onsite and clustered systems must meet specific water quality requirements because the sensitivity of the environment is high, e.g., wellhead protection areas or shellfish waters. Frequent and highly reliable operation and maintenance is required to ensure water resource protection. Issuing the operating permit to an RME instead of the property owner provides greater assurance of control over performance compliance. This allows the use of performance based systems in more sensitive environments than the Operating Permit Model. For a service fee, an RME takes responsibility for the operation and maintenance. This approach can reduce the number of permits and the administration functions performed by the regulatory authority. System failures are also reduced as a result of routine and preventive maintenance. The operating permit system is identical to that of the Operating Permit Model except that the permittee is a public or private RME. States may need to establish (and some already have) a regulatory structure to oversee the rate structures that RMEs establish and any other

measures that a public services commission would normally undertake to manage private entities in noncompetitive situations.

Model 5 - The Responsible Management Entity (RME) Ownership Model

Model 5 - The Responsible Management Entity (RME) Ownership Model is a variation of the RME operation and maintenance concept in the RME Operation and Maintenance Model, with the exception that ownership of the system is no longer with the property owner. The designated management entity owns, operates, and manages the decentralized wastewater treatment systems in a manner analogous to central sewerage. Under this approach, the RME maintains control of planning and management, as well as operation and maintenance. This management model is appropriate for environmental or public health conditions similar to those for the RME Operation and Maintenance Model, but Model 5 provides a higher level of control of system performance. It also reduces the likelihood of disputes that can occur between the RME and the property owner in the RME Operation and Maintenance Model when the property owner fails to fully cooperate with the RME. The RME can also more readily replace existing systems with higher-performance units or clustered systems when necessary. EPA recommends implementation of the management practices detailed in the RME Ownership Model in cases such as where new, high-density development is proposed in the vicinity of sensitive receiving waters. States might need to establish a regulatory structure to oversee the rate structures that RMEs establish and any other measures that a public services commission would normally undertake to manage entities in noncompetitive situations.